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*Comments of Network Operator Services
NTC Petition for Waiver, CC 96-45, DA 98-1301
July 14, 1998*

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
National Telephone & Communications,) DA No. 98-1301
Inc. Emergency Petition for Partial Waiver)

**NETWORK OPERATOR SERVICES, INC.'S
COMMENTS ON NATIONAL TELEPHONE &
COMMUNICATIONS, INC. EMERGENCY
PETITION FOR PARTIAL WAIVER**

Pursuant to Public Notice DA 98-1301,¹ Network Operator Services, Inc. ("NOS") hereby files comments in support of National Telephone & Communications, Inc.'s ("NTC") Emergency Petition for Partial Waiver ("Petition").

I. Introduction and Background

Section 254(d) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), requires every telecommunications carrier that provides interstate telecommunications service to contribute to universal service. The Federal Communications Commission's ("Commission") Universal Service Order of May 8, 1997, established that all

¹ Federal-State Joint Board on Universal Service, CC 96-45, *National Telephone & Communications, Inc. Emergency Petition for Partial Waiver, Pleading Cycle Established*, DA 98-1301 (rel. June 30, 1998).

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telecommunications carriers that provide interstate telecommunications services and certain other providers of interstate telecommunications must contribute to support universal service.² Contributions for schools, libraries and health care providers are calculated based on a carrier's interstate, international and intrastate end-user telecommunications revenues.³ Contributions for the high-cost and low-income programs are calculated based on a carrier's interstate and international end-user telecommunications revenues only.⁴ In July of 1997, the Commission released its Report and Order and Second Order on Reconsideration ("Second Order").⁵ In the Second Order, the Commission directed the National Exchange Carrier Association to create the Universal Service Administrative Company ("USAC"), an independently functioning, not-for-profit subsidiary, to perform the billing and collection functions associated with the universal service support mechanisms.⁶ The Commission instructed USAC to use the Universal Service Worksheet to collect information regarding a carrier's universal service fund ("USF") contribution. The Commission also

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776 (1997) at para. 772 ("Universal Service Order").

³ *Id.*

⁴ *Id.*

⁵ *See In the Matter of Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Dockets 97-21 and 96-45, Report and Order and Second Order on Reconsideration, FCC 97-253 (rel. July 18, 1997) ("Second Order") at paras. 41-43, 80. A draft copy of the worksheet appeared in an appendix. *See Id.* at Appendix C.

⁶ *See Second Order*, at paras. 25, 41-42.

effectively adopted⁷ a universal service assessment mechanism by requiring USAC to issue bills to contributors based on a formula that uses 1997 end-user telecommunications revenues to calculate 1998 contribution levels.⁸ Although the Commission amended its rules to include the Universal Service Worksheet as the vehicle for complying with the contributor reporting requirements, neither its Orders nor its rules explicitly state that a contributor's assessment will be based on the contributor's end-user revenues from the previous year.⁹

The goals of the universal service program are admirable. However, as the facts of the NTC Petition demonstrate, basing a carrier's USF contributions on prior year revenues can in some instances cause substantial hardship for both the carrier and its customers, undermining the goals of universal service.¹⁰ NOS therefore supports NTC's Petition.

II. Good Cause Exists for Granting NTC's Petition

Under Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules on its own motion or on petition if good cause is shown.¹¹ The Commission has defined the

⁷ It is not clear whether the Commission followed the necessary notice and comment procedures of the Administrative Procedure Act when it effectively adopted a rule through the promulgation of a form to collect information, especially where interested parties were afforded no opportunity to comment on the form prior to its adoption.

⁸ *See Id.* at para. 43.

⁹ *See Id.* at Appendix B-6; 47 C.F.R. §§ 54.709, 54.711 (1997).

¹⁰ Like NTC, but for different business reasons, NOS has experienced a significant decrease in its revenue base from 1997 to 1998 and has considered petitioning the Commission for relief from the current USF assessment mechanism.

¹¹ *See* 47 C.F.R. § 1.3.

standard for good cause as demonstration by a petitioner “that special circumstances warrant deviation from the rules and that such a deviation would better serve the public interest than the general rule.”¹² Indeed, the “safety valve” provided by Section 1.3 is integral to the Commission’s ability to adopt rules of general applicability.¹³ NTC requests partial waiver of Sections 54.703, 54.709, and 54.711 of the Commission’s Rules to allow NTC to exclude revenues attributable to a portion of its 1997 customer base for purposes of calculating its calendar year 1998 USF contributions. NTC argues that such a waiver is necessary because the financial impact on NTC of making USF contributions without the requested waiver are “immediate, ongoing and severe.”

The necessity of NTC’s request for partial waiver exposes a fundamental problem underlying the Commission’s USF assessment mechanism. Because current year USF contributions are based on prior year revenues without true-up, any company that experiences a substantial decline in revenues and/or customer base from year-to-year will encounter potentially severe financial hardships in attempting to meet its USF contribution obligation. While the Commission, and the industry in general, would like to believe the rosy scenario of healthy telecommunications companies

¹² *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, Order at para. 2 (rel. Sept. 29, 1997).

¹³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (agency’s discretion to proceed through general rules is intimately linked to the existence of a safety valve procedure for consideration of waiver requests based on special circumstances).

with improved financial performance year after year, the reality is that companies can and do experience financial difficulties, including revenue and customer loss.

As NTC recognizes, many carriers have and are recovering at least some, if not all, of the additional costs imposed by the new USF contribution burden in the form of explicit charges on end users' bills for universal service. However, where a carrier has lost a significant amount of its revenue and/or customer base from 1997 to 1998, if the carrier were to assess the full cost of its universal service assessment (based on 1997 revenues) on its smaller 1998 revenue/customer base, it would have to charge those end users much more than its competitors charge their customers. Given the extremely competitive nature of the interexchange market, a higher pass-through rate would price the carrier's services out of the market and cause additional revenue/customer loss. As the carrier attempts to recover an inordinate USF assessment from fewer and fewer customers, the cycle will eventually spiral out of control.

Under these circumstances, good cause exists for the Commission to grant NTC's requested waiver. Furthermore, NTC's Petition presents the Commission with an opportunity to reexamine the potentially devastating effects the USF assessment mechanism can and will have on smaller companies experiencing a declining revenue and/or customer base.¹⁴ NOS urges the Commission to seize this opportunity and consider a general exception or true-up mechanism for companies with declining revenue and/or customer bases.

¹⁴ Affinity Corporation recently submitted a petition requesting that it be permitted to base its 1998 USF contribution on current year revenues.

III. Conclusion

For the foregoing reasons, NOS supports NTC's Petition and urges the Commission to grant NTC the requested relief.

Respectfully submitted,



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July 14, 1998

Certificate of Service


I, Wendy Mills, hereby certify that the foregoing Comments of Network Operator Services, Inc. were served on the following via hand delivery this 14th day of July, 1998.

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